



In the Matter of:

DAVID W. PICKETT,

ARB CASE NO. 00-076

COMPLAINANT,

**ALJ CASE NOS. 99-CAA-25
00-CAA-9**

v.

DATE: November 2, 2000

**TENNESSEE VALLEY AUTHORITY (TVA),
OFFICE OF INSPECTOR GENERAL (OIG),
GEORGE PROSSER & DONALD DRUMM,**

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Edward A. Slavin, Jr., Esq., *St. Augustine, Florida*

For the Respondent:

Edward S. Christenbury, Esq., Thomas F. Fine, Esq., Brent R. Marquand, Esq., Dillis D. Freeman, Jr., Esq., *Tennessee Valley Authority, Knoxville, Tennessee*

ORDER

Respondent Tennessee Valley Authority (TVA) has moved the Administrative Review Board to enter an order striking complainant David W. Pickett's opening brief on the following grounds:

1. Complainant's brief was not filed by September 29, 2000, as required by the September 25, 2000, order of the Administrative Review Board (ARB). The brief received by TVA was postmarked October 2, 2000.
2. Complainant's brief does not include a certificate of service.
3. Complainant's brief does not comply with the ARB's August 22, 2000, order in that the top margin is less than 1 1/4 inch and the type is smaller than required. . . .
4. Complainant's brief contains scandalous, disparaging, and impertinent remarks about the Administrative Law Judge (ALJ) which should be stricken. . . .

Respondent's Motion to Strike at 1-2. Pickett responded to the Motion to Strike alleging: 1) that his counsel mailed the brief late on September 29th, but apparently the Postal Service did not receive it until October 2nd; 2) that the 1/4 variance from the required format is insignificant and that TVA's allegation that the type is smaller than required is incorrect; and 3) that "Americans have a right to criticize government officials and adjudicators," Complainant's Response to TVA Motion to Strike, Motion to Deny TVA Any Brief Extension and Motion For Oral Argument on October 17th at 2 n.1. Pickett also requested oral argument on TVA's Motion to Strike and on the substantive issues Pickett has raised in his brief.

We will accept Pickett's brief as timely filed based on his counsel's representation that he placed it in the mail on September 29th.

Given TVA's Motion to Strike, it is obvious that TVA received Pickett's brief. However, hereafter, counsel for Pickett is **ordered** to attach a Certificate of Service establishing compliance with 29 C.F.R. §24.8(b) (2000)^{1/} and service upon counsel of the opposing party, to all documents filed with the ARB in this and any other case.

We agree with Pickett that the type size does appear to comply with the ARB's type size requirements as indicated in our August 22, 2000 Order Establishing Briefing Schedule. Furthermore, although the top margin on Pickett's opening brief is 1/4 inch too narrow, the bottom margin on the brief is 1½ inches, therefore it does not appear that Pickett's counsel was attempting to circumvent the length restrictions. In this instance, we do not strike the brief for failure to comply with the ARB's format requirements. However, the format requirements are by no means onerous and by refusing to comply with them, Pickett's counsel runs the risk that the Board will return non-conforming pleadings.

Finally, we concur with TVA that counsel for Pickett has "engaged in personal and vitriolic attacks on a Department of Labor Administrative Law Judge," *Williams v. Lockheed Martin Corporation*, ALJ Case Nos. 98-ERA-40, 98-ERA-42; ARB Nos. 99-054, 99-064; Final Decision and Order, slip op. at 5 (Sept. 29, 2000). While counsel for Pickett has the right to criticize rulings of the ALJ with which his client disagrees, he has no right to engage in disrespectful and offensive personal attacks upon the ability and integrity of the ALJ; such attacks violate counsel's "professional obligation to demonstrate respect for the courts." *Id.* at 6. *Accord* ABA Model Rules of Professional Conduct, Preamble, Rules 3.5 and 8.2 (1999).

The requirement that counsel refrain from immaterial, offensive excoriation of the ALJs before whom he appears, does not conflict with the counsel's ethical duty to represent his clients "with zeal and fidelity within the rules." Rhesa Hawkins Barkdale, *The Role of Civility in Appellate Advocacy*, 50 SOUTH CAROLINA LAW REVIEW, 573, 577 (1999). Quite to the contrary, "the use of odiums, sarcasm, and vituperative remarks have no place in a brief and are wholly unwarranted. Frankly, resort to the use of such statements is an indication of a lack of confidence in the law and the facts to support the position of the one using them." *State ex rel. Dyer v. Union Electric Co.*, 312 S.W.2d 151,154 (Mo. Ct. App. 1958). A brief containing such invective ordinarily should be stricken. *Accord Dranow v. United States*, 307 F.2d 545, 549 (8th Cir. 1962). We find no reason to depart from the general rule in this case and accordingly, we **GRANT** TVA's Motion to Strike Pickett's opening brief. However, in this one instance, so that Pickett will not pay the price of his counsel's inappropriate statements, we will permit counsel to correct his professional lapse by deleting all personally disparaging remarks from his opening brief and resubmitting the brief to us, otherwise unedited and with the addition of no new argument or other material, by **November 16, 2000**. (If the brief is sent through

^{1/} This regulation provides, "Copies of the petition for review and all briefs shall be served on the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate Solicitor of Fair Labor Standards" 29 C.F.R. § 24.8.

the U.S. Mail or similar service, it **must** be postmarked no later than November 16, 2000). Nonetheless, the parties and their counsel are hereby given notice that, in the future, the ARB may strike, without a similar opportunity to refile, briefs or other filings containing professionally inappropriate content.

The remaining briefing schedule is established as follows:

Respondent may file a reply brief **postmarked no later than December 15, 2000**. Complainant may file a rebuttal brief, exclusively responsive to the reply brief, **postmarked no later than December 29, 2000**. Page limitation and format as described in the original briefing schedule issued on August 22, 2000, remain in effect.

Pickett's request for oral argument on TVA's Motion to Dismiss is **DENIED**, as oral argument is unnecessary to resolve the Motion. Pickett's Motion for Oral Argument on the substantive issues will be considered once briefing is completed.

SO ORDERED.

PAUL GREENBERG
Chair

E. COOPER BROWN
Member

CYNTHIA L. ATTWOOD
Member